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In the Supreme Court of the United States

October Term, 1923.

No. 155.

STATE OF MISSOURI ON THE RELATION OF JESSE
W. BARRETT, ATTORNEY GENERAL;
PUBLIC SERVICE COMMISSION OF MISSOURI;
KANSAS CITY GAS COMPANY, *Appellants*,
vs.
KANSAS NATURAL GAS COMPANY, *Respondent*.

Filed November 20, 1922.

*Appeal from the District Court of the United
States for the Western District of Missouri.*

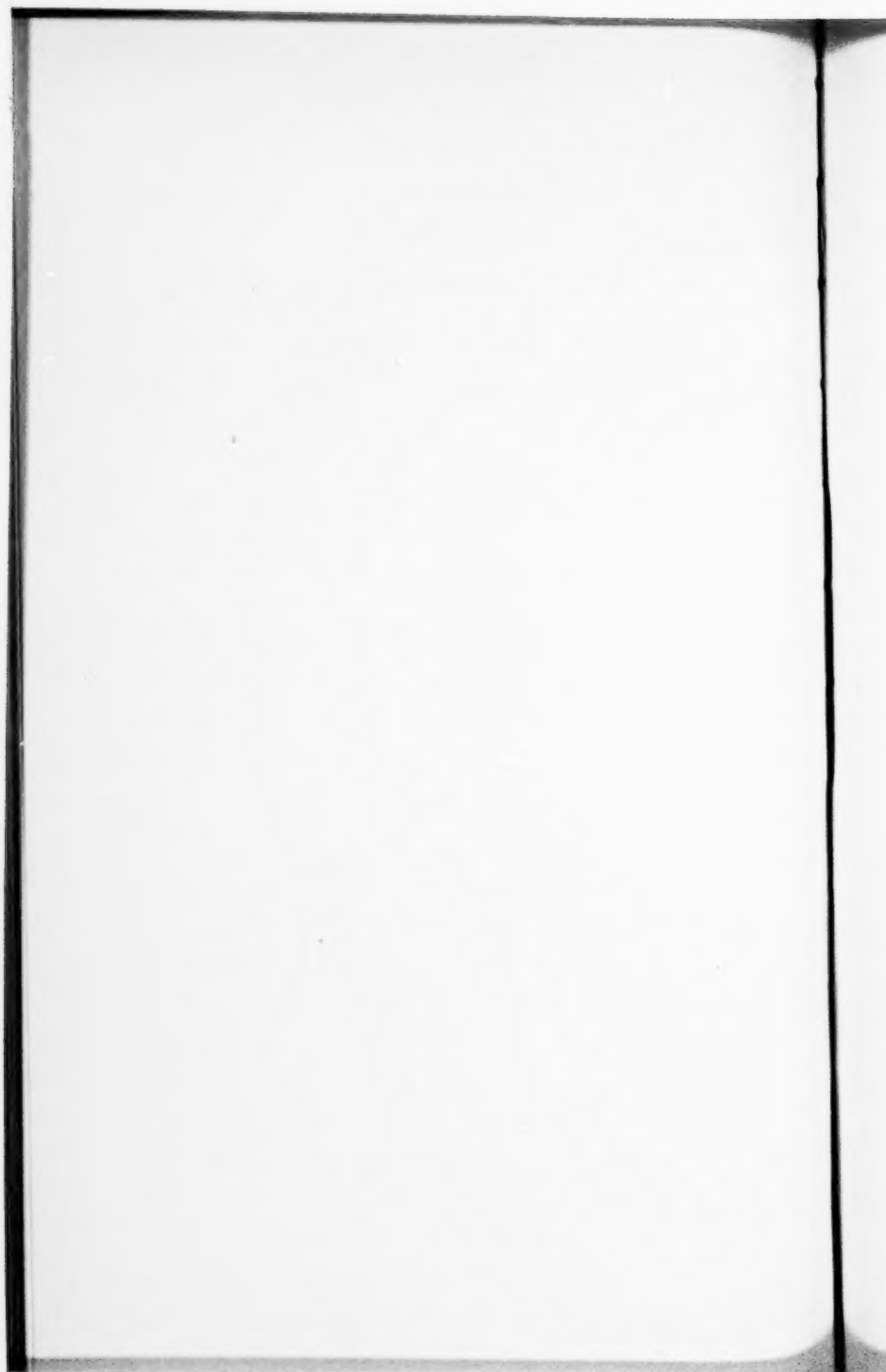
Consolidated with
No. 133.
KANSAS NATURAL GAS COMPANY, *Plaintiff in Error*,
vs.
STATE OF KANSAS, on relation of A. E. Helm, Attorney for the
Public Utilities Commission of the State of Kansas,
Defendant in Error,
and
No. 137.
STATE OF KANSAS EX REL., *Appellant*,
vs.
CENTRAL TRUST COMPANY OF NEW YORK, *Respondent*.

BRIEF FOR APPELLANTS.

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STATE OF KANSAS EX REL., *Appellant*,

VS.

CENTRAL TRUST COMPANY OF NEW YORK, *Respondent*.

BRIEF FOR APPELLANTS.

This suit was brought to enjoin the Kansas Natural Gas Company, hereinafter called the Supply Company, from shutting off the supply of

natural gas to the Kansas City Gas Company and other distributing companies in the State of Missouri. Jurisdiction rested on diverse citizenship (Rec. 3). The trial court denied the injunction on the ground that the Supply Company was engaged in interstate commerce and free from all state control. This appeal is to review that decree.

The interest of the State of Missouri and its Public Service Commission, hereinafter called the Commission, in this suit is to sustain its police power and its right to regulate public utilities furnishing natural gas within said state.

The interest of the Kansas City Gas Company in this suit lies in protecting itself and its investments through the regulatory powers of the Commission from being wiped out by arbitrary demands and summary changes in the town border rates for natural gas made by said Supply Company.

This case was consolidated for argument with the cases of *Kansas Natural Gas Company v. State of Kansas*, No. 133 (hereinafter called the Kansas case), on writ of error to the Supreme Court of Kansas to review a judgment of said court sustaining the jurisdiction of the Commission of said state over said Supply Company; and the case of the *State of Kansas v. Central Trust Co. of New York*, No. 137, on appeal from the United States District Court of Kansas denying the jurisdiction of the Public Utilities Commission of said state over said Supply Company.

The original bill of complaint in this case was filed by the State of Missouri and its Public

Service Commission (Rec. 2). On motion (Rec. 16) the Kansas City Gas Company was "made a party complainant" and filed an intervening bill of complaint (Rec. 16, 17) alleging the same facts, and that it had an interest in the subject of the action and the relief demanded, and praying the same relief; so that said Kansas City Gas Company is not a mere intervener but is a *party complainant*, and entitled to be considered as such

STATEMENT OF FACTS.

The material allegations of the bills of complaint admitted by the answer, are:

That the Supply Company "furnishes, delivers and sells natural gas" (Rec. 3, par. 6; 10, par. 6) "to the Kansas City Gas Company, the Joplin Gas Company, Fort Scott and Nevada Light, Heat and Power Company, Carl Junction Gas Company, Oronogo Gas Company, and other local distributing companies in other communities within the State of Missouri" (Rec. 3, 10); that it maintains physical connections within the State of Missouri between its plant and system and the distribution plants and systems of said local distributing companies (Rec. 3, 10, 13, par. 18); that its pipeline system is "physically and permanently connected within the State of Missouri to the main system of the Kansas City Gas Company and other local public service gas corporations within said State" (Rec. 7, par. 18; 13, par. 18); "that said local distributing companies own, operate, control and manage local gas plants and systems and operate the same for public use under privileges, licenses and franchises granted by the State of Missouri and by the political subdivisions and municipalities thereof in which they are doing business" (Rec. 4; 10, par. 6); "and that said Kansas Natural Gas Company has a *complete physical monopoly of the supply of natural gas* to said local distributing companies and said cities and their in-

habitants within the State of Missouri" (Rec. 4, par. 6); said Supply Company "*admits that it has a monopoly on the supply of natural gas to said companies*" (Rec. 11, par. 6); that on April 1, 1922, the Supply Company notified the distributing companies that it would increase the city gates rate for gas from 35 to 40 cents per thousand cubic feet (Rec. 6, par. 10; 12, 95); that the Kansas City Gas Company notified the Supply Company that it would not accept and receive the gas delivered by said Supply Company at said increased rate until authorized by the Public Service Commission of Missouri (Rec. 6, 12, 95); that thereupon the Supply Company notified the distribution companies that *unless they agreed to accept and pay for said gas at said increased rate, said Supply Company would discontinue the service and supply of natural gas on May 1, 1922, to said local distributing companies at Kansas City, Joplin, Oronogo, Carl Junction, Nevada, and other communities in the State of Missouri* (Rec. 6, par. 12; 12, 97); the bill further alleged (Rec. 6) and the answer admitted (Rec. 12) "that said Kansas Natural Gas Company will discontinue the supply of natural gas to said local distributing companies and the citizens and inhabitants of said city unless enjoined and restrained from so doing"; that the Supply Company did not file with the Commission in the manner provided by the Public Service Commission Act of Missouri any new schedule of rates or any new rate or charge or any new form of contract or agreement or any new practice relating to rates, charges or service (Rec. 7, par. 14; 12)

and said Supply Company filed no application with said Commission for any such change or rate increase (Rec. 7, par. 14) admitted (Rec. 12, par. 14).

The Supply Company denies the jurisdiction of the Commission to regulate its city gates rates for gas furnished to the Kansas City Gas Company and other distributing companies and refuses to file its schedule of rates and changes therein with the Missouri Commission in the manner provided by Sec. 69-12, of the Public Service Commission Act (Art. IV, Laws of Missouri 1913; R. S. Mo. 1919, Sec. 10478, par. 12), or to submit in any manner to the jurisdiction of said Commission or the State of Missouri in the matter of rates or service or supply of natural gas.

Appellants contend that the business carried on by the Supply Company consists primarily in supplying, delivering, furnishing and selling natural gas and natural gas service, locally and directly to said Kansas City Gas Company and other distributing companies and through them to the local general public.

The material facts stipulated on the trial are as follows:

The Supply Company is in control of and operates all the properties owned by the Kansas Natural Gas Company, The Kansas City Pipe Line Company, Kas Gas Company and Kansas Natural Gas, Oil Pipe Line and Improvement Company under private arrangements between said companies (Rec. 38, par. 1). During 1906 the Kansas City Gas Company commenced to furnish and sell natural gas to Kansas City, Missouri, and

its inhabitants under the terms and provisions of Ordinance No. 33887 of said city fixing rates for natural gas furnished by the Supply Company (Rec. 38, par. 2).

From 1906 to October, 1912, the Supply Company furnished gas to the Kansas City Gas Company and the latter accepted, received and paid for the same under and in conformity with the terms and provisions of a certain contract (Rec. 38, par. 3, 41) providing, among other things, that the Supply Company was the owner of gas lands and leases in the gas belt of Kansas and a pipe line from said fields to Kansas City, Missouri (Rec. 41); that the Kansas City Gas Company was the owner of an ordinance authorizing it to supply natural gas to said city and its inhabitants for a term of thirty years from September 27, 1906 (Rec. 49, 61), said ordinance being No. 33887, marked Exhibit 1 and attached to said contract (Rec. 41, 49); that the Supply Company will during the period of said ordinance "*supply and deliver* through its said pipeline or lines, to said parties of the second part, or any successor in the ownership of the property for the distribution of gas for Kansas City, Missouri, at a pressure of twenty (20) pounds at the point of delivery above mentioned, *natural gas in such amount as will at all times fully supply the demand for all purposes of consumption*, as provided in this contract, for the consideration hereinafter mentioned" (Rec. 41). Said contract further provided that, "so long as the party of the first part is able to *supply* the same, the parties of the second part agree to buy

from the party of the first part *all the gas they may need to fully supply the demand for domestic consumption in said city*" (Rec. 42). The consideration for such gas was a certain percentage of the gross receipts from the sale of said gas at said ordinance rates (Rec. 42, 43). The ordinance (Rec. 49) *runs for a term of thirty years* from September 27, 1906 (Rec. 61), and fixed a schedule of rates varying from time to time (Rec. 54). It referred to the gas supply contract with the Kaw Gas Company and The Kansas City Pipe Line Company, predecessors in title and interest of the Supply Company herein (Rec. 58); provided for the shut down of the manufactured gas plant and the use of the distribution system of the local company for the distribution and furnishing of said natural gas (Rec. 57, 60). This ordinance was attached to the gas supply contract (Rec. 41, 61).

There were gas supply contracts similar in form and substance between the Supply Company and the other local distributing companies in Kansas and Missouri (Rec. 5, par. 7; 12, 111), and said local companies operated under city ordinances substantially in the same form and substance as the ordinance of Kansas City, Missouri.

From October 12, 1912, to August 13, 1917, the Supply Company was operated by Receivers appointed by the United States District Court for the District of Kansas (Rec. 38) and by Receivers appointed by a state court of Kansas in an anti-trust and monopoly suit (see *McKinney et al. v. Landon et al.*, 209 Fed. 300, and *Landon et al. v. Kansas Natural Gas Co. et al.*, 217 Fed. 187); said Re-

ceivers, both federal and state, took over the Supply Company's properties and affairs and business and operated them under orders of their respective courts without specifically adopting said supply-contracts (Rec. 38, par. 4; 41) which were subject to rejection by the court; *but continued to deliver gas to the distributing companies and accepted payment therefor at the rates provided for in said contracts* (Rec. 38, par. 4) (249 U. S. 236, 243).

From August 13, 1917, to January 1, 1921, the Receivers of the Supply Company furnished gas to the Kansas City Gas Company and other distributing companies under and pursuant to certain administrative orders of the United States District Court for the District of Kansas (Rec. 38, 62, 65, 68, 70, 71, 72, 73). These court orders (Rec. 62 to 73) fixed both the purchase price and the selling rates of the distributing companies, and enjoined said companies from interfering with said Receivers maintaining said court-made rates upon the erroneous assumption that the distribution companies were mere agents of the Supply Company under said contracts; reversed by this court in *Public Utilities Comm. v. Landon*, 249 U. S. 236.

After the reversal of said Landon case by this court, on re-trial the United States District Court for the District of Kansas, in *Landon v. Court of Industrial Relations*, rendered its final opinion and finding on November 17, 1920 (269 Fed. 423, 432), that "the obligations of the Kansas Natural Gas Company under said supply-contracts

have been discharged and terminated by reason of the failure of gas as provided for in said supply-contracts"; and on December 24, 1920, entered its final decree (Rec. 39, 73), in which it enjoined all the rates fixed by Kansas and Missouri and the city ordinances and Commission orders of said states, and the "*rates fixed or referred to*" in said supply-contracts (Rec. 80).

Thereupon, December 24, 1920, the Federal Receivers (Rec. 39) by order of court returned the property and business of said Supply Company back to the corporation for management and control, and said business has been operated by said corporation since said date (Rec. 39, par. 7).

On May 3, 1920, the Kansas City Gas Company filed an application with the Public Service Commission of Missouri (Rec. 39, par. 8; 82), in which it showed the Commission that the Supply Company, by authority of the court (Rec. 71, 72), had increased its city gates rate for gas from 28 cents to 35 cents per thousand feet; asked for a corresponding increase in its selling rates and prayed the Commission (Rec. 83): "To authorize the Kansas City Gas Company to pay such price per thousand cubic feet for natural gas delivered at the city gates on and after the following schedule takes effect, as may be necessary to produce an adequate supply of gas to meet the demands of its customers therefor" (Rec. 83).

On June 14, 1920, the Missouri Commission rendered its opinion and order (Rec. 39, par. 9; 84), and after analyzing the evidence said (Rec. 87):

"We will, therefore, permit the Kansas City Gas Company to pay said 35-cent city-gate rate for natural gas and will approve the rates proposed for the Kansas City Gas Company to its consumers" (Rec. 87).

The Commission also entered on June 14, 1920, an order increasing the Kansas City Gas Company's selling rates (Rec. 39, 87), and further providing:

"Ordered 4: That the Kansas City Gas Company be permitted to pay the Kansas Natural Gas Company or its Receiver the 35-cent city-gate rate for natural gas as provided in the order of Judge Booth mentioned in the report of the Commission herein, until otherwise ordered by the Commission" (Rec. 88).

The Kansas City Gas Company filed with the Commission its *acceptance of this order* (Rec. 91), as provided by law (Sec. 25, Public Service Com. Act, Laws of Missouri 1913), and forthwith commenced to pay said Supply Company said 35-cent rate (Rec. 91) and ever thereafter continued so to do, until the threatened shut-off of the supply and the order of the trial court increasing said rates as above stated.

The Supply Company produces and-or purchases gas in the gas fields of Kansas and Oklahoma and carries the same by pipeline into and through the State of Kansas and into the State of Missouri (Rec. 39); it sells no gas direct to consumers except a few main line consumers and

to consumers in the Joplin, Missouri, mining district (Rec. 39, par. 10); all the gas produced or purchased in Oklahoma or Kansas by the Supply Company is so intermingled in the pipelines that it cannot be distinguished (Rec. 39, par. 10); said gas is transported to the various cities in Kansas and Missouri where the Supply Company maintains permanent physical connections within said states with the distribution systems (Rec. 39) of the distributing companies; the Kansas City Gas Company maintains gas holders in connection with its distribution system having a reserve storage capacity of five million cubic feet of gas (Rec. 39); in case of line breaks, interruptions or shortages in the pipeline supply, this reserve-holder-gas is used to supply the consumers (Rec. 39, par. 10). All the Supply Company's gas is sold in Kansas and Missouri (Kansas Case Rec. 13).

The gas delivered by the Supply Company to the Kansas City Gas Company is measured at two separate measuring stations operated by the Supply Company (Rec. 39, par. 11). One is located immediately west of the Kansas-Missouri state line in Kansas, from which station the Supply Company's *pipeline is extended some eight feet into the State of Missouri* and *upon a public street of Kansas City, Missouri*, and there physically and permanently connected to the street main system of the Kansas City Gas Company (Rec. 39, par. 11). The gas delivered at this station is measured or computed and billed to the Kansas City

Gas Company in accordance with measurements of a meter located in Kansas (Rec. 40). The *second measuring station is located* near the Kansas-Missouri state line *in the State of Missouri*, at which point about one-third of the total gas furnished to the Kansas City Gas Company is measured and delivered (Rec. 40). The Supply Company maintains at this second connection about 500 feet of pipeline between the Kansas-Missouri state line and said measuring station, *which pipeline is located on a public street of Kansas City, Missouri* (Rec. 40, par. 11). The gas furnished through this station is measured and computed and billed to the Kansas City Gas Company in accordance with the measurements of the *meter located in Missouri*; the Supply Company has no franchise granted by the city of Kansas City, Missouri, authorizing it to occupy the streets, alleys and public places upon and along which to lay, maintain or operate its pipelines (Rec. 40, par. 11).

There are no advance orders given by the Kansas City Gas Company to the Supply Company for the shipment of any definite quantity of gas to Kansas City Missouri (Rec. 40, par. 12) at any given time, but said gas is furnished and delivered continuously to meet the requirements of the Kansas City Gas Company as governed by the requirements of its consumers from time to time. Gas is delivered by the Supply Company to the distribution company and by the distribution company to the consumer "instantly" to supply his instantaneous and continuing demands.

(See Rec. in *K. C. Gas Co. et al. v. Kansas Natural Gas Company, John M. Landon et al.*, No. 330, Oct. term, 1918, p. 812, decision reported 249 U. S. 236.)

The pipelines operated by the Supply Company extend from the State of Oklahoma into and through the State of Kansas and into the State of Missouri, and said Supply Company furnishes gas to local distributing companies in some forty cities, towns and villages in the States of Kansas and Missouri (Rec. 40, par. 13); said pipelines lie in the main on the privately owned rights-of-way of the Supply Company, but cross public highways and in some instances run along the public highways in the States of Missouri and Kansas (Rec. 40).

The population of Kansas City, Missouri, is approximately 360,000 (Rec. 40, par. 14); the population served by the distributing companies receiving their gas supply from the Supply Company in Kansas and Missouri exceeds one-half million (Rec. 40).

No joint ownership or intercorporate relation exists between the Supply Company and the Kansas City Gas Company or any other local distributing company (Rec. 40, par. 15).

The Kansas Natural Gas Company is authorized to do business in the State of Missouri (Rec. 88). The objects and purposes for which it is incorporated are, among other things: "To produce, purchase and acquire natural gas; to pipe, convey and transport natural gas from the place or places where the same is produced, purchased

or acquired, to such cities, towns, villages and places in the States of Kansas and Missouri as may afford convenient and satisfactory markets for the same; to lay, maintain and operate" pipelines and "to lay such street mains and conduits as may be necessary to supply gas to consumers; to build, construct and operate" such apparatus "as may be necessary or convenient in the production, transportation and *supply* of natural gas" (Rec. 88).

The Kansas City Pipe Line Company, predecessor of the Kansas Natural Gas Company, and the party to the supply-contract with the Kansas City Gas Company, is authorized by its charter, among other things, to "market and sell" natural gas and "to take and hold rights and franchises for the *sale, furnishing* and transportation of natural gas" and "to purchase or otherwise acquire natural gas and to transport, pipe, market and sell the same to consumers thereof" (Rec. 89).

The Kaw Gas Company, named in the supply-contract and ordinance, and one of the predecessors in right, title and interest of the Kansas Natural Gas Company (Rec. 38), was authorized to do business in Missouri, and among other things was authorized to furnish, market and sell natural gas (Rec. 89, 90).

The Kansas Natural Gas Company on November 1, 1913, filed with the Public Service Commission of Missouri in the manner provided by the Public Service Commission Act of said state its schedule of rates, contracts, rules and regulations (Rec. 108-111).

On April 1, 1922, said Supply Company summarily notified the Kansas City Gas Company that on and after April, 1922, meter-readings it would charge at the rate of 40 cents per thousand cubic feet for all gas delivered at the city gates (Rec. 95); on April 20, 1922, the Kansas City Gas Company notified said Supply Company it would accept and receive gas delivered into its mains on and after said April, 1922, meter-readings only upon the express understanding that it would pay therefor at the rate of 35 cents per thousand cubic feet until the effective date of orders issued by the Public Service Commission of Missouri authorizing it to pay 40 cents per thousand cubic feet for gas or such other rate as said Commission might allow (Rec. 95, 96); on April 25, 1922, the Supply Company notified the Kansas City Gas Company that it would not furnish said gas at 35 cents, and that unless said Kansas City Gas Company agreed to accept and pay for said gas at the rate of 40 cents on or before the first day of May, 1922, said Supply Company *would shut off and discontinue the supply of gas to said Kansas City Gas Company* (Rec. 97); on April 26, 1922, the Kansas City Gas Company notified the Supply Company that it would not agree to accept and pay for said gas at said rate of 40 cents (Rec. 98); on April 29, 1922, this suit was commenced below to enjoin the Kansas Natural Gas Company from arbitrarily shutting off the supply of natural gas to the Kansas City Gas Company, the city of Kansas City, and other cities and communities in said state (Rec. 2).

The trial court denied the writ of injunction and dismissed the bill (Rec. 26, 27). The case is here on appeal for review. However, the trial court was under the necessity of entering a remedial and regulatory order allowing the Kansas City Gas Company to forthwith increase its selling rates for gas 5 cents to enable it to pay said 5-cent increase in the city gates rate, and accordingly enjoined said Commission from interfering with said increased rate (Rec. 26).

ASSIGNMENT OF ERRORS.

The complainants assigned the following errors (Rec. 29):

Assignment No. 1. That the court erred in holding that the furnishing, delivery and sale of natural gas locally at Kansas City, Missouri, either within or without the State of Missouri by the Kansas Natural Gas Company to the Kansas City Gas Company is interstate commerce, national in character and free from regulation by the State of Missouri through its Public Service Commission.

Assignment No. 2. That the court erred in denying the injunction prayed in the bill of complaint and intervening bill of complaint.

Assignment No. 3. That the court erred in dismissing the bill of complaint and intervening bill of complaint.

(21). In the Minnesota Rate Cases 230 U. S. 352, 1. c. 399 this Court said:

"The grant in the Constitution of its own force—that is, without action by Congress, established the essential immunity of inter-state commercial intercourse from direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all their regulations should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system of uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment, according to the special requirements of local conditions, states may act within their jurisdictions until Congress sees fit to act; and when Congress does, the exercise of its authority overrides all conflicting legislation.

"The principle which determines this classification, underlies the doctrine that the state cannot, under any guise, impose direct burdens upon interstate commerce."

This is a clear classification of admittedly interstate commerce into two classes:

(1) The Exclusive Class. Interstate commerce in and relating to subjects or matters, which in their nature are general or national and demand a general uniform system of regulation—as to these the power of Congress is exclusive of all state regulation.

In the Minnesota Rate Cases 230 U. S. 382,
1. a. 399 this Court said:

ASSIGNMENT OF ERRORS.
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force-first is, without action by Congress, ex-
cluded the essential principle of interstate
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the states with respect to those subjects ex-
cluded within the grant which was each a re-
sult of the demand that the states at all their
negotiations should be governed by a single au-
thority. It has repeatedly been declared by this
Court that as to those subjects which require a
general system of uniformity of regulation, the
power of Congress is exclusive. In other matters,
however, the power of the states is preserved, ac-
cording to the principle of federalism.
The special regulation of local conditions
states may act within their jurisdiction until
Congress sees fit to act and when Congress does,
the exercise of its authority overrides all con-
flicting legislation.
denying the jurisdiction of the states in com-
plaint and intervening bill of complaint.
The principle which governs this class of
action, whether the action be brought in dis-
trict court or in state court, is that the power
of complaint. "upon interstate commerce."

This is a clear classification of absolutely
interstate commerce into two classes:

(1.) The Exclusive Class. Interstate com-
merce in and relating to subjects or matters,
which in their nature are general or national and
demand a general uniform system of regulation—
to these the power of Congress is exclusive of all
state regulation.

(2). **The Permission Class.** Interstate commerce in and relating to subjects or matters, which in their nature are special or local and admit of a diversity of treatment or regulation according to the special requirements of local conditions—as to these the power of Congress is permissive of state regulation until Congress acts.

This classification was recognized, amplified and followed by this Court in *Pennsylvania Gas Co. vs. Public Service Commission* 252 W. S. 23.

2. **The Kansas Natural Gas**

It was recognized and followed by the Supreme Court of Kansas in the *Kansas* case No. 133, here on writ of error for review.

It was ignored and not followed by the Federal Trial Courts below in cases No. 137 and No. 155, here on appeal for review, said Courts holding that the commerce clause is exclusive and bars all state regulation of all subjects, matters and instruments of interstate commerce irrespective of their class—national or local.

5. **The specific exclusion of**

This Court very aptly said in the *Minnesota and Pennsylvania* cases supra, that no hard and fast rule—no rule of thumb—could be laid down to determine into which class all interstate commerce would fall; but each case must be decided on its own special, local and peculiar facts.

The class into which the case at bar falls depends upon a consideration of the following points.

(3). The Commission is authorized to conduct its business in and relating to the investigation of matters which in their nature are special or local and admit of a diversity of treatment or regulation according to the special requirements of local conditions as to these the power of Congress is exclusive of state regulation until Congress shall otherwise provide.

This classification was maintained until
 1964 when it was declassified and the
 information was made available to the public.

It was recognized and followed by the
House of Commons in the House of Commons
on 11th of April 1944.

It was suggested that not followed by the fact that this Court's action in cases No. 121 and No. 122, have an appeal for review, said Court's holding that the Congress should be exclusive and that all state regulation of all business, matters and instruments of interstate commerce investigative or their effects-national or local.

This Court very early said in the Minnesota and Pennsylvania cases supra, that no part and that no rule of thumb should be laid down to determine into which class all interstate commerce would fall, but each case must be decided on its own facts, local and peculiar facts.

The class into which the case at bar falls depends upon a consideration of the following factors:

ARGUMENT.

The points of law and fact affirmed by appellants and denied by appellee are as follows:

1. The public welfare requires that the Kansas Natural Gas Company be regulated.

2. The Kansas Natural Gas Company is a public utility at common law.

3. The Kansas Natural Gas Company is declared by statutes to be a public utility.

4. Interstate commerce in natural gas is local in its nature, is peculiarly of local concern, makes provision for local needs, pertains to local public service, and is subject to reasonable state regulation.

5. The specific exclusion of interstate commerce in natural gas from the Act of Congress regulating interstate commerce implies regulation by the states until Congress acts.

6. An importer who employs a licensed agency of the state, a public utility, to sell and market products shipped interstate, thereby consents to reasonable state regulation.

7. The decision in *Public Utilities Commission et al. v. Landon, Receiver of Kansas Natural Gas Company*, 249 U. S. 236, turned on the point that the Receiver had no cause of action for the reason that his rates were at that time consent rates or fixed by contract, and the challenged rates, then before this court, were made for distributing companies and not for the Receiver. It is no authority for the contention that the Kansas Natural Gas Company was then or is at this time, on the record now before this court, free from state regulation.

8. A public utility or one conducting a business affected with the public interest may not arbitrarily discontinue service for the non-payment of a controverted bill. Injunction will issue to prevent such wrongful act.

9. If the Kansas Natural Gas Company's rates are not subject to regulation, it is bound by contract, express and implied; first, to continue service until, after notice, a substitute can be provided; second, at rates agreed upon.

POINT I.

The public welfare requires that the Kansas Natural Gas Company be regulated.

That said Supply Company needs regulation is conclusively proven by the following facts:

It has a complete "monopoly on the supply of natural gas" (Rec. 4, par. 6; 11, par. 6) to all said distributing companies and some forty cities, towns and villages and 500,000 people within the States of Kansas and Missouri (Rec. 62, 65).

The court below in this case found: "*Now, it is very probable, of course, that this is a commodity that should, in some way, be regulated*" (Rec. 131).

The Federal Court in the Kansas case, Appeal No. 133, found: "The only source of supply of natural gas which said Receiver (of the Topeka distributing company) has or can procure is from the Natural Company." (*Central Trust Co. of N. Y. v. Consumers L. H. & P. Co.*, 282 Fed. 680; see brief for Supply Company in *Kansas Natural Gas Co., Plaintiff in Error, v. State of Kansas ex rel., Defendant in Error*, No. 642, Oct., 1922, Term in this court, p. 49.)

The Supreme Court of Kansas found: "This court reaches a conclusion * * * on the facts * * * that the regulation of its sale is necessary * * *." (*State ex rel. v. Kansas Natural Gas Co.*, 111 Kan. 809, 812, 208 Pac. 622.)

It usurped the right and assumed the power to determine and fix the selling rates for the Kansas City Gas Company and all other distributing companies in Kansas and Missouri; and through Receivers it enjoined said companies from applying to the rate-making powers of the states for reasonable rates satisfactory to them: "and the defendant distributing companies are permanently enjoined * * * from interfering with plaintiff (Receiver) in establishing and maintaining such rates as this court has approved or may hereafter approve for consumers of natural gas in Kansas and Missouri." (Landon Case, October, 1918, Term, Rec., p. 625.)

Reversed by this court in *Pub. Util. Comm. et al. v. Landon*, 249 U. S. 236.

See also:

Landon v. Pub. Util. Comm., 234 Fed. 152.
Landon v. Pub. Util. Comm., 242 Fed. 658.
Landon v. Pub. Util. Comm., 245 Fed. 950.
Landon v. Court of Industrial Relations
 (Kans. Comm.), 269 Fed. 411, 423, 433.
State v. Gas Co. et al., 102 Kan. 712, 172
 Pac. 713.

It so monopolized and dominated the natural gas supply in Kansas that it was prosecuted under the anti-trust and monopoly statutes of said State and held under a penal state receivership from 1912 to June 2, 1917. *Landon et al. v. Kansas Natural Gas Co.*, 217 Fed. 187; *McKinney v. Landon*, 209 Fed. 300. See also *State ex rel. v. Flannelly, Judge*, 96 Kan. 372, 152 Pac. 22.

Its rates and charges have always been restricted or regulated as follows:

A. From 1906 to October, 1912, by said supply-contracts and city ordinance rates referred to therein and attached thereto.

B. From October, 1912, to August, 1917, said contract and ordinance rates were continued in effect by administrative orders of court. Said State and Federal Receivers (Rec. 38, par. 4) "without specifically adopting or disavowing the supply-contracts of 1904-08 continued to deliver gas to local distributing companies and to accept payments as originally agreed." (*Commission v. Landon*, 249 U. S. 236, 243.)

C. From August, 1917, to November, 1918, under an administrative rate order of the United States District Court for the District of Kansas (Rec. 62), in which the Supply Company's rate was fixed at a certain percentage of the distributors' selling rates fixed by the court.

D. From November, 1918, to July, 1919, under another administrative rate order of the United States District Court for the District of Kansas (Rec. 65), in which the Supply Company's rate was fixed at a certain percentage of the distributors' selling rates fixed by the court.

E. From July 14, 1919, to July 1, 1920, under another administrative rate order of the United States District Court for the District of Kansas (Rec. 70-72), fixing city gates rates for the Supply Company ranging from 20 cents in Southern Kansas to 35 cents at Kansas City.

F. By the Public Service Commission of Missouri from July 1, 1920 (Rec. 87), to April 29, 1922, the date of the commencement of the suit below:

"Ordered 4: That the Kansas City Gas Company be permitted to pay the Kansas Natural Gas Company or its Receiver the 35-cent city-gate rate for natural gas as provided in the order of Judge Booth mentioned in the report of the Commission herein, until otherwise ordered by the Commission" (Rec. 88).

G. By the Public Utilities Commission of Kansas:

"That prior to about April 25, 1922, the said defendant (Kansas Natural Gas Company) maintained and charged a rate of 35 cents per thousand cubic feet for natural gate at the city gates of said cities; that said rate of 35 cents per thousand cubic feet of natural gas was authorized by an order of the District Court of the United States for the District of Kansas, First Division, under date of January 20, 1920, *and approved by an order of the Public Utilities Commission of the State of Kansas* under date of August 18, 1920." (Rec. in Kansas Case No. 133, Oct., 1923, Term, p. 6, par. XXXII.)

"The rate fixed by order of the Federal Court and approved by the Public Utilities Commission has been 35 cents per thousand cubic feet of gas to companies distributing and selling gas in various cities in this state. That was the legal rate" (*State ex rel. v. Gas Co.*, 111 Kan. 809, 810, 208 Pac. 622).

H. The court below in this case, though denying an injunction against the shutting off of the gas supply, was under the necessity of allowing a five-cent increase in the selling rates of the Kansas City Gas Company to enable it to pay a corresponding increase in the rates demanded by the Supply Company (Rec. 26).

Many of the states have passed laws governing these natural gas supply companies. "The legislation by the states demonstrates that the sale of natural gas should be regulated" (*State ex rel. v. Gas Co.*, 111 Kan. 809, 811, 208 Pac. 622).

"A general conception of the law-making bodies of the country that a business requires governmental regulation is not accidental and cannot exist without cause."

German Alliance Ins. Co. v. Kansas,
233 U. S. 389, syl.

"*Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. North Dakota*, 153 U. S. 391, demonstrate that a business by circumstances and its nature may rise from private to public concern and consequently become subject to governmental regulation. * * *

German Alliance Ins. Co. v. Kansas,
233 U. S. 389.

The final decree on rehearing, after reversal by this court (249 U. S. 236), in *Landon v. Commission*, the trial court permanently enjoined on behalf of the Receiver and the Kansas Natural Gas Company all rates fixed by statute, by ordinance and by Commission orders as confiscatory on the sole and only ground and theory *that they were subject to regulation*. (See opinion *Landon v. Comm.*, 269 Fed. 411, 421; decree Rec. 71, 76.)

"Seventh. That the proportional part of the rates prescribed by the 28-cent Rate Order (of the Kansas Commission), which was paid by said distributing companies to the Receiver of the Kansas Natural Gas Company during the time said rate schedule was in force, was non-compensatory to the Receiver, did not furnish the said Receiver a fair and reasonable return upon the property in his charge and used and useful in furnishing said gas to said distributing companies, *was confiscatory and violative of the Constitution of the United States*" (Italics ours, Rec. 76-77.)

If said Supply Company's rates were not subject to compulsion by the state they could not be enjoined as *confiscatory*.

Without conference or agreement, it summarily notified the Kansas City Gas Company and some

forty other distributing companies (Rec. 12) that it would within fifteen days increase its rate from 35 to 40 cents, a 14.3 per cent. increase, without time or opportunity for said companies to procure a corresponding increase in their selling rates. The Missouri Public Service Commission Act (Art. 4, Sec. 69-12, and Sec. 70, Laws 1913; R. S. Mo. 1919, Sec. 10478-12 and Sec. 10479, hereinafter quoted) provides that rates must be on file 30 days before they could take effect by operation of law, and the Commission may suspend them 120 days and then six months, pending hearings. The Kansas Act provides that no rates shall take effect without the order of the Commission after a hearing.

“Unless the commission shall otherwise order, it shall be unlawful for any common carrier or public utility governed by the provisions of this act within this state to demand, collect or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same services on the 1st day of January, 1911.” *Laws of Kansas* 1911, Chapt. 238, Sec. 30; G. S. 1915, Sec. 8358.

Therefore it is obvious that such a drastic notice was arbitrary and unreasonable and such business needs restriction and regulation.

Finally, an all sufficient reason, showing the need of regulating said Supply Company, is the fact that said company summarily, by mandatory notice, without conference or agreement, and without the

determination of the reasonableness of its demands by any city council, state commission, court, or public authority or private arbiter, threatened and declared its positive intent (Rec. 97) to shut off and discontinue the supply of gas to some forty cities, towns and villages, and one-half million people having no substitute or means of supply, unless its demands were immediately unconditionally met.

Nowhere in the record in this or these consolidated cases, or the Landon case (249 U. S. 236), is it claimed or suggested that the Kansas Natural Gas Company does not need regulation.

The following long list of cases, regulatory in their nature, in which the Kansas Natural Gas Company has been directly or indirectly involved and in which the States of Kansas and Missouri and their commissions and cities have been seeking in some manner to control said Supply Company, evidences a pressing need for regulation:

State of Kansas v. Flannelly, 96 Kan. 372, 833, 152 Pac. 22; 154 Pac. 235.

McKinney et al. v. Kansas Natural Gas Co., 206 Fed. 772.

Fidelity Title & Trust Co. v. Kansas Natural Gas Co. et al., 206 Fed. 772.

McKinney et al. v. Landon et al., 209 Fed. 300.

Fidelity Title & Trust Co. v. Landon et al., 209 Fed. 300.

Kansas City Pipe Line Co. et al. v. Fidelity Title & Trust Co. et al., 217 Fed. 187.

Landon et al. v. Kansas Natural Gas Co. et al., 217 Fed. 187.

Landon et al. v. McPherson, District Judge, 217 Fed. 187.

- Fidelity Title & Trust Co. v. Kansas Natural Gas Co. et al.*, 219 Fed. 614.
- McKinney v. Kansas Natural Gas Co.*, 219 Fed. 614.
- State of Kansas ex rel. v. The Wyandotte County Gas Company*, 88 Kan. 165, 127 Pac. 639.
- Wyandotte County Gas Company v. State of Kansas*, 231 U. S. 622.
- State ex rel. v. Litchfield*, 97 Kan. 592, 155 Pac. 814.
- State ex rel. v. Gas Co.*, 100 Kan. 593, 165 Pac. 1111.
- St. Joseph Gas Co. v. Barker, Atty. Gen., et al.*, 243 Fed. 206.
- Landon et al. v. Pub. Util. Comm. of Kansas et al.*, 234 Fed. 152.
- Landon v. Pub. Util. Comm. of Kansas*, 242 Fed. 658.
- Landon v. Pub. Util. Comm. of Kansas*, 245 Fed. 950.
- Public Utilities Commission for Kansas et al. v. Landon et al.*, 249 U. S. 236.
- Kansas City, Missouri, et al. v. Landon et al.*, 249 U. S. 236.
- Kansas City Gas Company et al. v. Kansas Natural Gas Company et al.*, 249 U. S. 236.
- Landon et al. v. Court of Industrial Relations of Kansas et al.*, 269 Fed. 411.
- Landon et al. v. Court of Industrial Relations of Kansas et al.*, 269 Fed. 423.
- Landon et al. v. Court of Industrial Relations of Kansas et al.*, 269 Fed. 433.
- State of Missouri ex rel., v. Kansas Natural Gas Co.*, 282 Fed. 341.
- State of Missouri ex rel. et al. v. Kansas Natural Gas Company*, No. 155, October, 1923, Term. U. S. Supreme Court.

State of Kansas v. Gas Co., 111 Kan. 809,
208 Pac. 622.

*Kansas Natural Gas Company v. State of
Kansas*, No. 133, October, 1923, Term.
U. S. Supreme Court.

*Central Trust Co. v. Consumers L. H. & P.
Co.*, 282 Fed. 680.

*State of Kansas v. Central Trust Co. of
New York*, No. 137, October, 1923, Term.
U. S. Supreme Court.

From the foregoing facts and authorities it clearly appears that the public welfare demands that the business, rates and service of said Supply Company should be regulated.

POINT II.

The Kansas Natural Gas Company is a public utility at common law.

What constitutes a public utility in point of fact is sometimes difficult to determine. The line of demarcation between a public business and a private business is not always clearly drawn in this country at this time. At common law railroads, warehouses, innkeepers, ferriers and auctioneers were well recognized public callings subject to regulation. As the states of this country began to develop and enlarge their functions, and organized society became more complex and the need of state regulation more pressing, the number of different callings that were considered public in their nature has rapidly increased so that today we have not only railroads but all common carriers of persons and property, including street railways, taxicab and bus-line companies, water companies, electric light and power companies, heating companies, telephone and telegraph companies, grain elevators, stock yard companies, stock commission companies, ice companies, insurance companies, banks, oil, gas and water pipeline companies, irrigation companies, and others which are deemed and considered to be so far public in their nature as to call for more or less restriction and regulation.

In *German Alliance Insurance Company v. Kansas*, 233 U. S. 389, this court had occasion to render an exhaustive opinion distinguishing a private from a public business. In that case the syllabus reads:

"A public interest can exist in a business, such as insurance, distinct from a public use of property, and can be the basis of the power of the legislature to regulate the personal contracts involved in such business."

* * * * *

"A general conception of the law-making bodies of the country that a business requires governmental regulation is not accidental and cannot exist without cause."

In the opinion, the court said (p. 406):

"We may put aside, therefore, all merely adventitious considerations and come to the *bare and essential one*, whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far *affected with a public interest* as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, *which makes the public interest* that justifies regulatory legislation. We can best explain by examples. The transportation of property—business of common carriers—is obviously of public concern and its regulation is an accepted gov-

ernmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as *the furnishing* of water and light, including in the latter *gas* and electricity. We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. *The basis of the ready concession of the power of regulation is the public interest.*" (Italics ours.)

After discussing various kinds of business which had been adjudged public in their nature, the court said (p. 411):

"It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and cannot be applied though *modern economic conditions may make necessary or beneficial its application.* In other words, to say that government possessed *at one time a greater power* to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today." (Italics ours.)

In *Terminal Taxicab Co. v Dist. of Col.*, 241 U. S. 252, May 22, 1916, this court again had occasion to distinguish between private and public business. In that case this court held that a Taxicab Company was a public utility subject to regulation "as to the terminal and hotel business, but not as to the garage business." The mark of distinction was that in its regular, fixed and uniform service back and forth between

hotels and railway stations it held itself out to serve all who applied at a regular and uniform rate, whereas its general garage and trip business to various parts of the city and country was a matter of private contract with each customer for each trip.

In the opinion (p. 254), the court said:

"The plaintiff is 'an agency for public use for the conveyance of persons,' etc.; and none the less that it only conveys one group of customers in one vehicle. The exception of the Terminal Company from the definition of common carriers does not matter. The plaintiff is not its servant and does not do business in its name or on its behalf. It simply hires special privileges and a part of the Station for business of its own.

The next item of the plaintiff's business, constituting about a quarter, is under contracts with hotels by which *it agrees to furnish enough taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel*, receiving the exclusive right to solicit in and about the hotel, but limiting its service to guests of the hotel. We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But *the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab. We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand.*

We certainly may assume that in its own interest it does not attempt to do so. The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389. See *Peck v. Tribune Co.*, 214 U. S. 185, 190." (Italics ours.)

In that case it is pertinent to note that the Taxicab Company agreed "*to furnish enough taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel,*" and that the service was regular and uniform back and forth between railroad terminals and hotels at regular rates, and that through the hotel or the terminal station "*the public generally was entitled to the service of the Taxicab Company.*" It held itself out to *serve all who applied* within those limitations. This seems to be a rational basis upon which to distinguish a public from a private business.

In the instant case the Supply Company offers to serve all consumers and distributing companies on and along its lines who apply for service at a uniform, regular and published schedule of rates without negotiations, agreement or private contract.

In *San Joaquin Co. v. Stanislaus County*, 233 U. S. 454, this court again points out that a public utility is a service or facility open to the public, that all the people within certain limits have the right to use it. At page 460 the court says:

"The declaration in the Constitution of 1879 that water appropriated for sale is appropriated to a public use must be taken according to its subject-matter. The use is not by the public at large, like that of the ocean for sailing, but by certain individuals for their private benefit respectively. (Citing authorities.) The declaration therefore does not necessarily mean more than that *the few within reach of the supply may demand it for a reasonable price.*" (Italics ours.)

So in the case at bar, any distributing company, the city itself or any individual within reach and on the supply lines may demand service at a reasonable rate.

The facts in the case at bar which characterize the Supply Company as a public utility within the adjudicated cases, are the following:

It has a complete monopoly on the supply of natural gas. (*Brass v. Stoesser* 153 U. S. 391; *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517.)

The business of the Supply Company is "affected with a public interest" (*German Alliance Ins. Co.*, 233 U. S. 389). It serves directly and indirectly approximately one-half million people (Rec. 40, par. 14).

The Supply Company occupies the public highways of the States of Kansas and Missouri. (Rec. 40, 103.)

It occupies the public streets of the cities served to the extent of maintaining pipelines therein for the delivery of gas to the distributing companies. (Rec. 39-40.)

It has the power of eminent domain. "Lands may be appropriated * * * for the piping of gas, in the same manner as is provided in this article for railway corporations." (Sec. 2194, G. S. Kan. 1915.)

It is licensed to do business in Kansas and Missouri (Rec. 88, 89) and is subject to the same regulation as a domestic corporation.

"Any corporation organized under the laws of another state, territory, or foreign country, and authorized to do business in this state, shall be subject to the same provisions, judicial control, restrictions, and penalties, except as herein provided, as corporations organized under the laws of this state. (L. 1907, ch. 140, Sec. 27, May 27)" G. S. 1915, Sec. 2140.

"The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State." Constitution of Missouri, Art. XII, Sec. 5.

It makes no private, individual or separate contracts for service with private consumers served along its lines and in the Joplin, Missouri, District, but serves them and charges a published schedule of rate (Rec. 39).

It now has no contract as to rates with any of the distributing companies it serves, said original contracts having been annulled as to rates by decree of court at the suit of said Supply Company (Rec. 73, 269 Fed. 423), and no other written contracts have been made between said Supply Company and the distributing companies.

It undertook by contracts (Rec. 41) to perform the public service of furnishing and supplying natural gas required by city ordinances (Rec. 11, par. 7).

It undertook that service for the full term of said ordinance, thirty years, or any extension or renewal thereof, practically in perpetuity (Rec. 41).

It undertook the furnishing of a full and complete supply of "natural gas in such amount as will at all times *fully supply the demand* for all purposes of consumption" (Rec. 41).

It undertook "so long as" it "is able to supply the same" to furnish and supply the Kansas City Gas Company "*all the gas they may need to fully supply the demand for domestic consumption* in said city" (Rec. 42).

It has *in fact* established and now maintains natural gas public service to the Kansas City Gas Company and some forty other public service companies, serving one-half million people (Rec. 40, par. 14).

Its contract obligations and its undertaking in fact was and is primarily "to furnish" natural gas. It is immaterial where such gas comes from.

Transportation is a necessary incident to the

business of *furnishing*. The accident of geography does not change the contract or the intent of the parties or the obligation of the Supply Company to *furnish* natural gas.

It has made local physical connections between its plant and system and the plants and systems of said local public utilities. (Rec. 39.)

It continuously furnishes and delivers and sells natural gas to the Kansas City Gas Company as needed and simultaneously with the demands of its customers (Rec. Landon Case, No. 330, October, 1918, Term, p. 812).

It employs licensed agencies of the state, public utilities, to sell and market its product.

In 1915 it filed an application with the Public Utilities Commission of Kansas (Rec. Landon Case, No. 330, October, 1918, Term, p. 54) to fix rates for the distributing companies it served on the unwarranted assumption that they were its mere agents and had no voice in the rates charged consumers. (249 U. S. 236.)

It filed its own schedule of rates, rules and regulations with the Public Service Commission of Missouri in 1913 as provided by the Public Service Commission Act of said State (Rec. 109-111).

Finally, and the controlling characteristic of a public utility, Taxicab case, *supra*, it offers service to all distributing companies, cities, towns, villages and consumers along its lines at a uniform, classified, promulgated and published "schedule of rates" and charges. Record page 72 shows a "Schedule of Rates for Sale of Gas by the Re-

ceiver of the Kansas Natural Gas Company to Distributing Companies," thus publishing in the same manner that any public utility publishes its "schedule of rates." This notice runs "*To All Distributing Companies Supplying Natural Gas to All Cities Named Below.*" It is not addressed to any particular distributing company. It does not propose a private contract with any company. Neither the caption nor the body of the notice carries the name of any distributing company. It is wholly immaterial to the Supply Company who or what the distributing company is. The notice further reads: "You will take notice that from and after March 25, 1920, and until further notice, the following Schedule of Net Rates will be charged for natural gas delivered into the plants of the respective distributing companies at the measuring stations located at the connection between the distributing plant and the pipe line system operated by the Receiver, which are classified into zones as follows:" Then there are three zones with three different classes of rates, yet no distributing company is named in any of these zones, nor is anything in the nature of a private contract or agreement suggested; but merely rates named, "applying to" various *cities and towns* located in said several zones. Its private consumers along the lines are given the same rates "as are charged *city consumers* in the city situated nearest to them." This promulgated and published offer and schedule of rates runs to all distributing companies, cities, towns and consumers on the Supply Company's lines, classifying

them into three zones, on "Field lines and towns," "Southern Trunk," "Northern Trunk and branches."

Nothing could be a more general and unrestricted offer to serve *all who apply* for gas than this formal published notice and schedule (Rec. 72).

The notice of increase complained of in this suit (Rec. 95) was also general in form, arbitrary in fact, suggested no contract and identical notices were sent to all distributing companies raising said rate to 40 cents per thousand cubic feet (Rec. 12, par. 10) and (Rec. in Kansas Case, No. 133, p. 6, par. 33; 12, par. 4).

The conclusion on this head is that the Supply Company is in fact and at common law a public utility subject to regulation.

POINT III.

The Kansas Natural Gas Company is declared by statutes to be a public utility.

The Kansas Public Utilities Act (Laws of Kansas, 1911, Chap. 238; G. S. 1915, Chap. 97) provides:

"The term 'public utility,' as used in this act, shall be construed to mean every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, *except for private use, any equipment, plant, generating machinery, or any part thereof, for * * ** the conveyance of oil and *gas through pipe lines* in or through any part of the state. * * *" (G. S. 1915, Sec. 8329; Laws of Kan. 1911, Chap. 238, Sec. 3).

The Commission is given general jurisdiction over both rates and service of all public utilities and is also authorized to fix "joint rates" for all public utilities.

The Missouri Public Service Commission Act (Laws of Missouri 1913, p. 557, R. S. Mo. 1919, Chap. 95) provides:

"10. The term '*gas plant*,' when used in this chapter, *includes* all real estate, *fixtures and personal property* owned, operated, controlled, used or to be used for or *in connection*

with or to facilitate the manufacture, distribution, sale or furnishing of gas (natural or manufactured) for light, heat or power.

11. The term 'gas corporation,' when used in this chapter, includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any *gas plant operating for public use* under *privilege, license* or franchise now or hereafter granted by the state or any political subdivision, county or municipality thereof." (R. S. Mo. 1919, Sec. 10411, subd. 10 and 11, Laws of Missouri 1913, p. 558.) (Italics ours.)

The Supply Company may contend here that the Missouri Act does not cover the plant and business of said Company, but that point was not raised in the answer (Rec. 10) nor in the evidence or argument, nor was it decided by the court below (Rec. 26, 123). It "has no franchise granted by the City of Kansas City, Missouri, authorizing it to occupy the streets, alleys or public places upon and along which to lay and maintain its pipe lines" (Rec. 40), but the above Act extends to all gas corporations controlling or managing any gas plant operating "*for public use*" under "*privilege, license* or franchise."

The Supply Company is licensed to do business in the State (Rec. 90). It occupies the public highways and the streets of the cities presumably with at least a license or consent; at least it is

estopped to claim that it is a trespasser or wrongfully upon the public ways.

In *International Trust Co. v. American L. & T. Co.*, 62 Minn. 501, 503, 65 N. W. 78, 79, the court said:

"A privilege, as distinguished from a mere power, is a right peculiar to the person or class of persons on whom it is conferred, and not possessed by others. As applied to a corporation, it is ordinarily used as synonymous with 'franchise,' and means a special privilege conferred by the state, which does not belong to citizens generally of common right, and which cannot be enjoyed or exercised without legislative authority."

In the instant case, the Supply Company exercises the special privilege and monopoly of furnishing natural gas to numerous cities and towns; it is licensed by the state to do such business; it occupies the public streets of the cities to a limited extent under its supply contracts and by authority, leave, license and consent of the municipalities it serves. The Missouri Act clearly and comprehensively covers this situation. Any corporation, domestic or foreign, doing business in the State of Missouri, consents to reasonable state regulation under Section 5, Article 12, of its Constitution: "The exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well being of the state."

Art. I, Sec. 2, Laws 1913, p. 560 (R. S. Mo. 1919, Sec. 10411, subd. 25 and 26) provides:

"25. The term 'public utility,' when used in this chapter, includes every common carrier, *pipe line corporation, gas corporation, * * ** as these terms are defined in this section, and each thereof is hereby *declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission* and to the provisions of this chapter.

"26. The term 'service,' when used in this chapter, is used *in its broadest and most inclusive sense*, and includes not only the use and accommodation afforded consumers or patrons, but also *any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility and to the use and accommodation of consumers or patrons.*" (Italics ours.)

Art. IV, Sec. 68, Laws 1913, p. 602 (R. S. Mo. 1919, Sec. 10477, subd. 1 and 3) provides:

"Every gas corporation * * * shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. * * * Every unjust or unreasonable charge made or demanded for gas, electricity, water or any such service, or in connection there-

with, or in excess of that allowed by law or by order or decision of the commission is prohibited. * * *

"No gas corporation * * * shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Art. IV, Sec. 69, Laws 1913, p. 603 (R. S. Mo. 1919, Sec. 10478) provides:

"The commission shall: 1. Have general supervision of all *gas corporations*, electrical corporations and water corporations having authority under any *special* or *general law* or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, *for the purpose of furnishing* or distributing water or *gas* * * * and all *gas plants* * * * owned, leased or operated by any gas corporation * * *"

Art. IV, Sec. 69-12, Laws 1913 (R. S. Mo. 1919, Sec. 10478-12) provides:

"The commission shall have power to require every gas corporation * * * *to file with the commission and to print and keep open to public inspection schedules showing*

*all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation. * * * Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation * * * in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time. * * * The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise."*

Art. IV, Sec. 70, Laws 1913 (R. S. Mo. 1919, Sec. 10479) provides:

"Whenever there shall be filed with the commission by any gas corporation, electrical corporation, water corporation or municipality any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or facility, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested gas corporation, electrical corporation, water corporation or municipality, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the gas corporation, electrical corporation, water corporation or municipality affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such

order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective: PROVIDED, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months."

Art. VII, Sec. 127, Laws 1913, p. 648 (R. S. Mo. 1919, Sec. 10538) provides:

"The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."

This Act was liberally construed by the Supreme Court of Missouri in *State ex inf. v. Kansas City Gas Company*, 254 Mo. 515, 163 S. W. 854, as follows:

"That act is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to-wit, that a public utility (like gas, water, car service, etc.) is in its nature a monopoly; that competition is inadequate to protect the public, and, if it exists, is likely to become an economic waste; that State regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility-owner, must be in the name of the overlord, the

State, and to be effective must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock or bond or note issued as surely is finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust willy nilly.

That there had been a vast increase in such utilities in the last decade or two and that evils have grown up crying out lustily for a cure by the lawmaker, is writ large in current history. The act, then, is a highly remedial one filling a manifest want, is worthy a hopeful future, and on well-settled legal principles is to be liberally construed to further its life and purpose by advancing the benefits in view and retarding the mischiefs struck at—all *pro bono publico*. Besides all which, the lawmaker himself has prescribed it 'shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between the patrons and public utilities.' (Sec. 127)." (254 Mo. 515, 534.)

* * * * *

"The commission is better equipped with experts, technical knowledge, and other efficient aids to a neutral and full investigation than would be any commissioner appointed by the court. Its visitorial and administrative powers are so vast and so flexible as to mold its procedure and orders to the pressure of the real facts found to exist. Heavy penalties follow disobedience to its orders as

a spur to obedience. It has full machinery to compel discovery and the law coerces compliance. The matter touching the business of going concerns, the hearings are not hampered or clogged by technicalities, but businesslike simplicity, speed and efficiency are provided for as were seemly and meet. Persons and corporations unjustly affected by the orders and proceedings have a quick remedy by rehearing, by review in court and by appeal here. *He who reads that act and does not see a complete rounded scheme for dealing with the business of public utilities at every spot where the shoe pinches the public or the utility, reads it to little purpose.* He who reads it and does not see that the yearning of the lawmaker was to have the courts trust the commission in the first instance to solve such business problems, as those presented in this case, reads it to still less purpose." (254 Mo. 515, 540.)

The Kansas Supreme Court likewise construed the Kansas Act very liberally. In *State ex rel. v. Postal Telegraph Co.*, 96 Kan. 298, 150 Pac. 544, after citing the statute at length, the court says (p. 303):

"It will be seen from the foregoing statutes that the legislature has promulgated a comprehensive program for the regulation and control of public service corporations. The public utilities commission, succeeding to all the powers conferred upon the state board of railroad commissioners, and by its own enlarged powers conferred by later enactments, has power to supervise the conduct of public service corporations in this commonwealth."

See also *State v. Railway Co.*, 76 Kan. 467, 92 Pac. 606; affirmed in *Mo. Pac. Ry. Co. v. Kansas*, 216 U. S. 262; *The State v. Railway Co.*, 81 Kan. 430, 105 Pac. 704; *Railway Co. v. Railway Commissioners*, 85 Kan. 229, 116 Pac. 506; *The State ex rel. v. Railroad Companies*, 85 Kan. 649, 118 Pac. 872; *Winfield v. Court of Industrial Relations*, 111 Kan. 580, 207 Pac. 813; *State ex rel. v. Wyandotte Gas Company*, 88 Kan. 165, 172 Pac. 639, affirmed by this court in 231 U. S. 622; *State ex rel. v. Gas Co.*, 111 Kan. 809, 208 Pac. 622.

Similar statutes giving jurisdiction to state commissions over such natural gas supply companies have been enacted in all the states of the Union where natural gas supply companies exist and are doing business. *Pennsylvania Gas Co. v. Pub. Serv. Comm.*, 252 U. S. 23; *Pennsylvania v. West Virginia*, 262 U. S. 553.

In *German Alliance Ins. Co. v. Kansas*, 233 U. S. 384, this court said:

"What makes for the general welfare is matter of legislative judgment, and judicial review is limited to power and excludes policy."

The conclusion on this head is that the law-makers of the states have declared natural gas supply companies to be public utilities requiring public regulation and that such declared public policy is not open to judicial review.

Southwestern Oklahoma Power Co.
vs

Commission 220 Pac 370

POINT IV.

Interstate commerce in natural gas is local in its nature, is peculiarly of local concern, makes provision for local needs, pertains to local public service, and is subject to reasonable state regulation.

It has always been conceded by appellants and oft decreed by courts that the purchase and production of natural gas in one state and the transmission and sale thereof in another is interstate commerce; and that state legislation, designed primarily to prohibit commerce in natural gas or to discriminate in favor of one state and its inhabitants as against another, infringes upon the commerce clause of the Federal Constitution. In our brief in the Landon case in this court, p. 94, we said: "It is also settled that the right of carrying natural gas from one state into another is the right of conducting traffic and commercial intercourse in natural gas between states and cannot be prohibited under color of the police power of the state." These principles have been fully settled by this court. *West v. Kans. Natl. Gas Co.*, 221 U. S. 229; *Haskell v. Kans. Natl. Gas Co.*, 224 U. S. 217. *Pennsylvania v. West Virginia*, 262 U. S. 553. *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23.

The question remaining is whether or not this interstate commerce in natural gas is "national" in its character and subject to regulation only by

Congress or "local" in its nature and subject to regulation by the states.

The answer to that question is found in the following facts of record:

The record shows that the Supply Company has a complete monopoly (Rec. 4, 11) of the supply of natural gas to some forty cities, towns and villages in Eastern Kansas and Western Missouri, and serves one-half million people; that said distributing companies have no other source of supply of natural gas, that the primary undertaking and duty of the Supply Company is to furnish natural gas (Rec. 41). It is immaterial where that gas comes from. The duty, bottomed on the original supply-contracts (Rec. 41) maintained by the Receivers while the business was in *custodia legis* and continued by the Supply Company, since, was to furnish natural gas. The furnishing is local to the Kansas City Gas Company and other distributing companies and at Kansas City (Rec. 41) and some forty other cities and communities served. The furnishing of this gas "is peculiarly of local concern."

It is for the inhabitants of the cities served as distinguished from the public at large. It "makes provision for local needs" by undertaking the supply of gas provided for in local natural gas franchise ordinances, granted to distributing companies (Rec. 41-49); and "pertains to a local public service." It is delivered to and through the instrumentality of local licensed agencies, public service companies of the states.

This natural gas is so peculiarly local in its nature and restricted in its uses and method of handling, that it cannot be reconsigned and transported on past the points of delivery to some other market but must be sold and consumed, if at all, in a comparatively restricted area.

Permanent physical connections are made and must be maintained between the plant and pipe line system of the Supply Company and the public service companies served (Rec. 39).

Local measuring stations and meters are and must be maintained and operated at or within the town borders of the cities served, where the gas is locally, daily, hourly, momentarily and continuously delivered and sold by the Supply Company to meet the consumers' instantaneous demands upon the distributing companies.

The Supply Company occupies the public highways of the states (Rec. 40) and exercises the power of eminent domain, and occupies the public streets at the point of delivery, with the license or acquiescence of the cities, towns and villages served (Rec. 39).

There are no advance orders for natural gas (Rec. 40) but it is delivered "instanter" (Rec. Landon case No. 330, October, 1918 Term, p. 812) as required by the customers, singly and in aggregate, twenty-four hours a day, three hundred and sixty-five days in the year.

The Supply Company offers service to all consumers, distributing companies, cities and towns on its lines who apply (Rec. 109-111).

It has and makes no special contracts with any consumer or distributing company.

Its original gas-supply-contracts were at its own suit annulled and set aside as to rates, but the service established under those contracts continues in full force and effect and it accepts the benefits and fruits of that business.

It furnishes and sells natural gas not under private negotiation and contract, but upon promulgated and published schedules of uniform rates.

The foregoing facts of record clearly bring this case within the class of cases local in their nature and subject to state regulation as laid down in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 29-31:

"In dealing with interstate commerce it is not in some instances regarded as an infringement upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce, *when needed to protect or regulate matters of local interest*. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself. In varying forms this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the Minnesota Rate Cases, 230 U. S. 352. The paramount authority of Congress over the regulation of interstate commerce was again asserted in those cases. It was nevertheless recognized that *there existed in the States a permissible exercise of authority, which they might use until Congress had taken possession of the field of regulation*.

After stating the limitations upon state authority, of this subject, we said (p. 402): 'But within these limitations *there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction* although interstate commerce may be affected. *It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention.* Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government *because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies;* hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that *the States should continue to supply the needed rules* until Congress should decide to supersede them. * * * Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. *Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals* because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power.

In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible.

The rates of gas companies transmitting gas in interstate commerce are not only not regulated by Congress, but the Interstate Commerce Act expressly withholds the subject from federal control. C. 309, Sec. 7, 36 Stat. 539, 544.

The thing which the State Commission has undertaken to regulate, while part of an interstate transmission, *is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.*

This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power

of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers *is required in the public interest* and has not been attempted under the superior authority of Congress.

It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the State from making local regulations of a reasonable character." (Italics ours.)

The foregoing language applies in every particular, to the Supply Company in the instant case, except that the title of the gas changes where it passes from the Supply Company's pipe lines in the public streets to the distributing companies' mains in the public streets.

Now it is well settled law that the character and classification of commerce whether interstate or intrastate, national or local is not determined or affected by the change of carriers. *Texas & N. O. R. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111; *So. Covington Ry. v. Covington*, 235 U. S. 537; *Atchison & Topeka Ry. v. Harold*, 241 U. S. 371.

It is equally well settled that such classification of commerce is not determined or made upon the basis of ownership or change of title of the commodity in transit. *Swift & Co. v. United States*, 196 U. S. 375; *Gulf Ry. v. Texas*, 204 U. S. 403; *Atchison & Topeka Ry. Co. v. Harold*, 241 U. S. 371.

In the Texas case, *supra*, Justice Brewer said:

"It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation."

The character of the commerce carried on by the Supply Company is wholly immaterial in this case. There is no contract between consignor and consignee; there are no bills-of-lading; there are no contracts to transport gas from Oklahoma to Missouri. The essential undertaking of the Supply Company on the record as it now stands is "to furnish" natural gas at Kansas City and at some forty or more other cities to said local distributing companies; and to furnish that gas under a published and promulgated schedule of rates—not under privately negotiated special contracts.

A case squarely in point is, *North Carolina Pub. Serv. Comm. v. So. Power Co.*, 282 Fed. 837. The defendant was a New Jersey corporation operating a large hydro-electric power plant in North Carolina. It furnished, delivered and sold power at the city gates of numerous cities for local distribution and sale. The local companies' rates were regulated by the State Commission. The Supply Company notified the distribution companies of increased rates and threatened to shut off the current if not promptly paid. The court held that the Supply Company was a public service corporation doing a business affected with a public interest and that it could not increase its city gates' rates to the distributing companies without the approval of the State Commission.

There is a line of analogous liquor cases which establish the principle that before the Supply Company can successfully claim that the business of furnishing and selling natural gas shipped interstate is free from state control, it must show that said sales take place or are confirmed or consummated in the foreign state, and that said Supply Company is not locally selling and locally delivering said gas to meet the immediate, instantaneous, simultaneous and indiscriminate demands of its customers or its customers' customers. *Heyman v. Hays*, 236 U. S. 178; *In re: Rahrer*, 140 U. S. 545; *McDermott v. Wisconsin*, 228 U. S. 115. This the Supply Company cannot do in this case. The entire transaction, the purchase, the sale, the delivery, the measurement, the furnishing and the payment are local and within the territorial boundaries of the regulating state.

The Supply Company's business is not capable of one uniform system of regulation.

State of Kansas ex rel. v. Flannelly, 96 Kans. 372; 152 Pac. 22; P. U. R. 1916C, §10.

Manufacturers' Light & Heat Co. v. Ott, 215 Fed. 940, 944.

Jamieson v. Indiana Natural Gas & Oil Co., 128 Ind., 555, 28 N. E. 96.

Mill Creek Coal & Coke Co. v. Pub. Serv. Comm., 7 A. L. R. 1081, 1. c. 1091, 100 S. E. 557, 562.

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The fixing of natural gas rates is not the fixing of freight rates. It is not the fixing of the cost of transportation. It is the fixing of commodity rates—selling rates of a commodity locally. It must of necessity vary in each city served, depending upon the volume of business done, the character and classification of consumers and numerous other factors entering into and reflected in commodity prices. Transportation is a mere incident.

In *Mill Creek Coal & Coke Co. v. Pub. Serv. Comm.*, *supra*, the court said:

“The duty of the power company to sell at reasonable rates was owed to the citizens of Virginia and to the public in this state (West Va.). But the two duties do not overlap, as they do where rates of transportation are concerned. *The price at which a commodity is sold is essentially local*, affecting chiefly those in the community where it is made, and only incidentally, if at all, touching those outside the community.” (Italics ours.)

The maintenance of the Supply Company's supply of gas within the city, its pipe lines in and upon the city's streets and its meters within or near the city, continuously ready to serve, constitutes an implied standing offer to deliver, measure and sell locally at reasonable and authorized rates; the turning of the consumers' burner cocks and the drawing of the gas from the mains of the distributing company and in turn the delivery of the gas by the Supply Company into the

mains of the distributing company, constitutes an acceptance of that offer and an implied promise to pay a reasonable or authorized city gates' rate. These entire transactions are purely local.

There is no claim in these cases that any state, commission or city is or has attempted, by regulation, legislation or otherwise, to discriminate against any consumers or localities or to prohibit the movement of natural gas from one state into another. On the contrary, this action is maintained for the purpose of requiring the Supply Company to file its rates with the Commission as provided by law and to show said Commission by competent evidence the merits of its demands so as to enable the Commission to allow it and said distributing companies reasonable and compensatory rates; and to enjoin the Supply Company from enforcing its demands by the destructive arbiter of force instead of the constructive rule of reason. The regulation here sought is the same form of modern, constructive regulation prescribed in forty-seven states of this Union.

From a practical standpoint, there is no insuperable difficulty in the way of the Commissions of both Kansas and Missouri determining with reasonable accuracy the reasonable city gates rates for natural gas furnished by the Supply Company. The plant value, operating costs and reasonable net returns of said Supply Company may easily be allocated between the two states and the various cities served on the basis of the number of consumers' meters installed, or the volume of gas sold or any other commonly accepted unit.

It must be presumed that rates fixed by the Commission are reasonable and compensatory. The Commission Act so requires and the ordinary course presumes it. That presumption prevails until the contrary is proven. It follows that if the rates fixed are non-confiscatory and reasonable they cannot be an undue burden upon or unreasonable interference with interstate commerce.

The conclusion on this head must be that the interstate commerce in natural gas in this case is local in its nature and therefore subject to reasonable state regulation.

POINT V.

The specific exclusion of interstate commerce in natural gas from the Act of Congress regulating interstate commerce, implies regulation by the states until Congress acts.

The Pennsylvania Case above quoted fully establishes this principle.

Referring to the Minnesota Rate Cases, which by the way dealt only with the general freight rates, and had nothing to do with commodity rates either local or interstate, this court (p. 29) said:

"It was nevertheless recognized that there existed in the state a permissible exercise of authority, which they might use *until Congress had taken possession of the field of regulation*. After stating the limitations upon state authority of this subject, we said (p. 402): 'But within these limitations there necessarily remains to the States, *until Congress acts*, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to *which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention*. Thus there are certain subjects having the most obvious and *direct* relation to interstate commerce, which nevertheless, *with the acquiescence of Congress*, have been controlled by state legislation from the foundation of the

Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, *the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the states should continue to supply the needed rules until Congress should decide to supersede them.* * * * Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope *without unnecessary loss of local efficiency.* Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible.

The rates of gas companies transmitting gas in interstate commerce are not only not regulated by Congress, but the Interstate Commerce Act expressly withholds the subject from Federal control. C. 309, Sec. 7, 36 Stat. 539, 544." (Italics ours.)

The Interstate Commerce Act provides (Sec. 1):

"The provisions of this act shall apply to common carriers engaged in * * * the transportation of oil or other commodities except water and except natural or artificial gas by pipe line or partly by pipe line and partly by railroad or by water."

If Congress had intended gas supply companies to go free from all regulation, it would not have mentioned them in the Interstate Commerce Act. They would have been left with the countless other subjects and instruments of interstate commerce in the general body of commerce of the Nation. To mention them suggests that they need regulation. It is impossible to derive from the Constitutional grant, under the facts and record of this case, an intention that they should go uncontrolled pending Federal intervention. Here, too, must be remembered the localizing characteristics of the Supply Company above enumerated.

The conclusion on this head must be that the specific exclusion of gas supply companies from the Interstate Commerce Act implies the acquiescence of Congress in state control.

POINT VI.

An importer who employs a licensed agency of the state, a public utility, to sell and market products shipped interstate, thereby consents to reasonable state regulation.

It cannot be too strongly impressed or too oft reiterated that the Supply Company, in the last analysis, is not primarily engaged in interstate commerce at all. It is engaged in the business of *furnishing* natural gas locally to local distributing companies for local use. It does not seek an open market where commodities generally are bought and sold. The general body of the public at large are not its customers. It did originally by contract, it had at the time of the trial below, and it always must make arrangements, by contract or agreement, express or implied, with some local public utility, some licensed agency of the state, performing a public service, in order to market its products shipped interstate.

Its original supply contracts with the Kansas City and other distributing companies, undertook to furnish natural gas pursuant to and in accordance with and at the rate specified in a certain city ordinance thereto attached, granting the use of the public streets to a local public utility (Rec. 41). Similar arrangements were made with all other local companies. (Rec. 12.)

In the Landon Case, *supra*, this court found, on the record, that:

"During the years 1904-1908, by separate agreements, it undertook to supply many local companies with gas; * * * that the receivers took over the Supply Company's property, affairs and business and operated them under orders of the court without specifically adopting or disallowing the supply-contracts of 1904 and 1908; they continued to deliver gas to local distributing companies and to accept payments as *originally agreed*." (Italics ours.)

Mark well—this was the status of the Supply Company at the time of the decision in the Landon Case.

In the Kansas Case, the Supply Company in its return and answer to the alternative writ of mandamus (Rec. in that case p. 13) says: "That said Kansas Natural Gas Company * * * sells gas to distributing companies at the respective city gates for an *agreed price*."

From which it appears that the Supply Company always has, does now, and ever will be under the necessity of using and employing licensed agencies of the states, public utilities having franchises, to market its imports. Such an importer is not engaged in interstate commerce of a national character but is engaged in local trade and traffic subject to state regulation.

This principle was clearly announced by that great expounder of the Constitution, Chief Justice Marshall, in the early case of *Brown v. State of Maryland*, 12 Wheat. 419, at 443, thus:

"So if he (importer) sells by auction, auctioneers are persons licensed by the state, and if the importer chooses to employ them he can as little object to paying for this service as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation without annexing to it also the privilege of using the officers licensed by the state to make sales in a peculiar way. The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains and ought to remain with the states. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is undoubtedly an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state."

The furnishing of gas or other public utilities to the inhabitants of the city is a *state function* kindred to building roads and paving streets over which the state alone has control. In *Field v. Barber Asphalt Co.*, 194 U. S. 618, the claim

was made that a Missouri statute was void because it authorized the common council to name the brand of material in paving contracts, thereby excluding an imported asphalt from competition with other asphalts. The Court held (page 622) that while the statute operated to exclude Trinidad Lake asphalt from the State, it was a proper and rightful exercise of the state's power; that legislation of a state may in a great variety of ways affect commerce and persons engaged in commerce without constituting a regulation of it within the meaning of the Constitution (*Pa. Rd. Co. v. Hughes*, 191 U. S. 477), and that the right of the state in the exercise of its police power to make regulations which affect interstate commerce has frequently been sustained.

Certainly the right of the Supply Company to engage in interstate commerce is not so supreme, paramount and over-towering that it transcends and supersedes the sovereign right of the states and their municipalities and the property right of their public service corporations from any voice in determining the kind and character of gas they desire, whether natural, manufactured, coal gas, water gas or any other kind of gas.

Yet the irresistible *deductio ad absurdum* of the Supply Company's claim is that its right to import gas carries with it the unrestricted right not only to raise, lower and fix its rates but, at its own will and caprice, to supply or refuse to supply and to shut off gas and to change the quality, kind, character and quantity of gas and service in and to said states and some forty pub-

lic service corporations and forty or more cities, towns and villages and one-half million people willy nilly; for, if the state has no power to regulate the rates, it has none to regulate the quality or character of service or to determine the use of gas, or to exclude such use altogether.

Such a conclusion is unthinkable in our dual system of government with its many checks and balances on personal rights and governmental powers.

The conclusion on this head must be that, at least, so long as said Supply Company is engaged in business in the States of Missouri and Kansas and until it is ready to withdraw wholly and permanently from doing business in said states on reasonable terms as fixed by statute or by some competent public authority; and so long as it employs the public utilities of said states directly or indirectly to market its product, it consents to reasonable state regulation.

POINT VII.

The decision in *Public Utilities Commission et al. v. Landon, Receiver of the Kansas Natural Gas Company*, 249 U. S. 236, turned on the point that the Receiver had no cause of action for the reason that his rates were at that time consent rates or fixed by contract, and the challenged rates, then before this court, were made for distributing companies and not for the Receiver. It is no authority for the contention that the *Kansas Natural Gas Company* was then or is at this time, on the record now before this court, free from state regulation.

There were four separate appeals in the so-called Landon Case; two by the Public Utilities Commission of Kansas; one by the Public Service Commission of Missouri and the City of Kansas City, Missouri, and one by the Kansas City Gas Company and The Wyandotte County Gas Company; all on a joint record. Counsel for said Kansas City Gas Company and Wyandotte County Gas Company in that case urged upon the attention of the court, both in oral argument and brief, *that the question of interstate commerce was immaterial to a decision in that case* and that the Receiver and Kansas Natural Gas Company, both parties to said proceeding, *had no cause of action* and were in no position to complain of the challenged rates because, as the record then stood, their compensation was fixed by contracts still in

force and effect and the rates complained of were fixed for and on behalf of the distributing companies and not the Supply Company.

In our brief in this court in that case, No. 330, October, 1918 Term, p. 61, we said:

"The following *fatal infirmities* in the plaintiff's case are disclosed by the record and will be discussed in this order:

1. The Kansas Natural Gas Company's *price* for gas was *contractual*, and it had no legal or *actionable right*, title or interest in the *rates* charged by the Kansas City and Wyandotte County Gas Companies to their patrons.

2. The Receiver's *price* for gas is *contractual*, and he has no legal or *actionable right*, title or interest in the rates charged by said local companies to their patrons.

3. The Wyandotte County Gas Company's rate for natural gas is legislative.

4. The Kansas City Gas Company's rate for natural gas is legislative.

5. The price paid by the Kansas City Gas Company and the Wyandotte County Gas Company to the Receiver and Kansas Natural Gas Company for gas is an item of operating cost of said local companies to be considered and approved by the state commissions in making rates for said local companies.

6. The question of interstate commerce is *immaterial, remote, incidental*. Reasonable regulation of public utility rates, including the allowance or disallowance of items of operating cost purchased interstate, is not burdensome regulation of interstate commerce.

7. The Receiver and Kansas Natural Gas

Company offered no evidence of any agreement with the local companies *to modify their supply-contracts or to increase the price* to be paid by the local companies to the supply-company for the gas furnished."

We then quoted at length from the record and the decrees appealed from, showing that the supply-contracts fixed the Supply Company's compensation, had been continued in effect by the Receiver and had never been disavowed or cancelled at the date of said proceedings.

This court took that view of the case and ordered the bills dismissed (249 U. S. 236, 246):

"The challenged orders related directly to prices for gas at burner tips and only indirectly to the Receiver's business. They were under no compulsion to accept unremunerative prices; even the original supply-contracts had not been adopted and were subject to rejection. Our conclusion concerning relationship between the Receivers and local companies renders it unnecessary to discuss the effect of rates prescribed for the latter. The Receivers are in no position to complain of them."

Counsel for the Supply Company attach much importance to the words "directly" and "indirectly" in the above decision, attempting to classify interstate commerce as national or local in character by the use of that one word in this decision. To those familiar with the trial, record, oral argument and briefs in that case, it is apparent that

those terms do not refer to the question of commerce at all, but to the *relationship* then existing "under the facts here disclosed" (opinion p. 245) between the Supply Company and the distributing companies. The following language demonstrates that fact: "They (the Receivers) were under no *compulsion* to accept *unremunerative prices*."

That word "*compulsion*" is used advisedly, cautiously, technically and upon consideration of the record facts in the case. The challenged orders *were* compulsory, upon the distributing companies, because made for them and by sovereign power; but not upon the Supply Company, because its rates were contractual—"consent rates"—then on the record before the court. The contracts had not been "rejected."

The word "*unremunerative*" is also used advisedly, technically and upon consideration of the record. "Unremunerative" means unprofitable or unattractive from the standpoint of consenting and contracting parties. It is not synonymous with confiscatory—imposed by sovereign power and not affording a fair return.

Even the word "prices" is used, as distinguished from "rates," the former meaning an agreed basis of exchange and the latter meaning an enforced exchange.

"Even the *original* supply-contracts had not been adopted and were *subject to rejection*," shows beyond cavil that the court was considering the contractual relation of the parties, as the record then disclosed, and was not ruling on the question of interstate commerce. This is still further

intensified by: *"Our conclusion concerning relationship between the Receivers and local companies renders it unnecessary to discuss the effect of rates prescribed for the latter."* What the court very clearly means, as disclosed by the record, was that the relationship then existing was contractual, the Supply Company's price was fixed by contract, the Receivers had continued that contract in effect to the day of the trial, the challenged rates were made for the distributing companies, the Supply Company could not participate in any increase while the contracts were in existence and therefore the question of interstate commerce was immaterial to the Receiver and *"renders it unnecessary to discuss the effect of rates prescribed for" the distributing companies upon the Supply Company.* "The Receivers were in no position to complain of them"—they had no cause of action.

The decrees appealed from in that case show that those contracts fixed the relation between the Supply Company and the distributing companies and were in force and effect at the time the rate orders complained of were made and said case heard.

Quoting further from our brief before this court in the Landon Case, No. 330, October, 1918 Term (249 U. S. 236):

"In the decree against the 'Kansas defendants' (Rec. 600) it is said:

'Nothing contained in this decree, nor in the opinion upon which it is based, shall be construed as determining the rights of any of

the Missouri defendants, touching the question of interstate commerce, or *the status of the distributing companies' contracts in Kansas or Missouri.*' (Rec. 604.)"

In the opinion on the final decree appealed here (Rec. Landon case 615) the trial court said:

"Now, whether these contracts were originally valid or invalid, and whether they became *functi officio* even if they were valid in their inception, are questions that it is not necessary for the court to decide at this time. The Kansas Natural Gas Company has in its pleadings prayed to have these contracts set aside as to it. I do not deem it advisable at this time to make any decision with regard to *the validity of the contracts as between the original parties to them*, whether they are still valid, whether they have ceased to be valid or whether they were invalid in their inception. While I shall deny the prayer of the Kansas Natural Company at this time it will be without prejudice to any action on the part of that company that it may see fit to take, whether in the cases that are pending in this court No. 1351, Equity, or No. 1 Equity, or otherwise. If it should see fit to take proper action to determine the validity of these contracts this decision will not prejudice it from so doing." (Rec. Landon case 620; 245 Fed. 956.)

If, in the Landon Case, this court had taken the Receiver's view, that his title of the gas extended to the consumers' meters, then the decision

would, of necessity, have been the same as the decision in the Pennsylvania case, to-wit, that the Commission had jurisdiction over the rates of both the Receiver and the local company and could fix separate or joint rates as the case required. But the Commission in that case had not fixed joint rates or any rates in which the Receiver could have an interest, "on the record then before the court." Obviously, the regulation of the whole business includes the regulation of all its parts. Therefore, if the Commission had jurisdiction in the Pennsylvania Case to regulate the selling rates to consumers of *interstate gas*, it can here fix reasonable city gates rates for such gas. The city gates rates are directly reflected in the consumers' rates. (See the decree appealed from allowing five-cent increase to both the Supply Company and the Kansas City Gas Company, Rec. 26.)

It is important to note that this court did not say that natural gas sold in interstate commerce is wholly free from state regulation. It said that it was free from *unreasonable* interference by the state. That is equivalent to a finding that the gas sold by the Supply Company to local companies is free from *confiscatory* regulation. The word "unreasonable" under the due process clause means "confiscatory." If the court in that case had intended to hold that interstate commerce in natural gas was national in character and wholly free from state regulation, it would not have qualified that statement by the word "unreasonable."

Could it be contended in the Pennsylvania Case that state regulation in the interest of public welfare could be defeated by the segregating in ownership of the supply properties from the distribution properties by the simple subterfuge of the sale or assignment of the pipe line properties. Can it be contended in the case at bar that by the simple merger of title of the Supply Company's properties and the distribution companies' properties, the police power of the state is enlarged from the mere regulation of the distribution companies to the regulation of the Supply Company. The police power of the state is not so fickle and frivolous as to be so lightly thwarted or enlarged.

So far as this court went in that case it sustained the regulatory powers of the State Commissions. On the record before the court it could not have done more. There were no rates made for the Supply Company.

What this court said in that case was that the Supply Company's title to the gas ended at the point of delivery and that it therefore could not, without a new contract, without some Commission order and without any consent of the distributors, arbitrarily superimpose its will upon said companies and dominate their proceedings and rights before the Commissions and courts.

POINT VIII.

A public utility or one conducting a business affected with the public interest may not arbitrarily discontinue service for the non-payment of a controverted bill. Injunction will issue to prevent such wrongful act.

It is well settled common law that a public utility or one conducting a business affected with the public interest may not arbitrarily deny or discontinue a public service for the non-payment of a controverted bill.

In the Taxicab Case, *supra*, this court said (p. 255):

"We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand."

In *Landon v. Pub. Util. Comm.*, 242 Fed. 658, 690, Judge Booth, after holding that the business of the Supply Company was interstate commerce and free from Commission regulation, said:

"This does not necessarily mean that the Receiver or the Company (Kansas Natural Gas Company) after the receivership can fix rates at their discretion. There still remains remedies for unreasonable rates. See *Covington Bridge Co. v. Kentucky*, 154 U. S. 204."

In the Bridge Company Case just cited, this court, after holding that a connecting bridge between Ohio and Kentucky was an instrument of interstate commerce and free from state control, said (p. 222):

"We do not wish to be understood as saying that, in the absence of Congressional legislation or mutual legislation of the two States, the company has the right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that the charges shall be reasonable, and the question of reasonableness must be settled as other questions of a judicial nature are settled, by the evidence in the particular case." (Italics ours.)

In *Randolph v. St. Joseph Gas Co.* (250 S. W. 642, 1. c. 645). The Company turned off the supply of gas for the non-payment of a controverted bill. The consumer sued for damages but was unable to prove very substantial damages. The Supreme Court of Missouri laid down the common law of that state as follows:

"But even without this proof, and in the light of the honest dispute over the correctness of the bill presented, it must be held that plaintiff's legal rights were invaded by the shutting off of the gas under the circumstances, and this affords sufficient basis for a finding of damages. Under such state of facts, damage will be presumed. This rule is too well settled to require citation of authorities."

Defendant urges that the proper proceeding on the part of plaintiff would have been to have paid the bill as presented, and then to have sued for refundment of any excess paid, if any. *The law is to the contrary.* The right of the gas company to shut off the gas upon the nonpayment of a bill as presented *is not an absolute right*; and, where there is a bona fide dispute as to the amount, the act of shutting off the gas to enforce payment properly, may be considered *arbitrary and outside the company's rights.*" (Italics ours.)

In *State ex rel. v. Kinloch Telephone*, 93 Mo. Appeal 349, l. c. 363, 67 S. W. 684, where the Telephone Company cut off the service for the nonpayment of a controverted bill and a controversy arose, the court said that the Company "*cannot be judge in its own case and decide the dispute*" (l. c. 362). Also

"If in fact, fair service was rendered during the time in dispute, the company has a good case to collect the rent for that time (Webster Telephone case, 17 Neb. *supra*), but cannot arbitrarily cut off appellants from a hearing and force them to submit to its terms or do business without a telephone. The facts of cases wherein a company or individual, bound to serve the entire community, seeks to withdraw service from some customer on account of defaulted payments, or other omission to comply with his contract, must be attended to, and if it is apparent that no good cause exists for the withdrawal and that the defendant will not be harmed by compelling it to continue to supply the customer, it should be compelled; otherwise the remedy of mandamus, which all the authorities agree may be invoked in such cases, will prove useless."

In *State ex rel. v. Postal Telegraph Co.*, 96 Kan. 298, 150 Pac. 544, the court held:

"Where a telegraph company maintained a telegraph station for a number of years at an average deficit of \$134.33 per annum it should have applied to the public utilities commission to discontinue it, and it was unlawful to close the station and quit business thereat until such permission was granted." (Syl. 3.)

Other cases holding that a public utility cannot shut off and discontinue public service for the nonpayment of a disputed or controverted bill and that injunction is the proper remedy to prevent such action are as follows:

Dodd v. City of Atlanta, 113 S. E. 166; 154 Ga. 33.

Poole v. Paris Mountain Water Co., 62 S. E. 874; 81 So. Car. 438.

Birmingham Waterworks Co. v. Davis, 77 So. 927; 16 Ala. App. 333.

Sims v. Alabama Water Co., 87 So. 688; 205 Ala. 378.

Borough of Washington v. Washington Water Co., 62 Atl. 390, 70 N. J. Eq. 254.

Foster v. Monroe, 82 N. Y. S. 653; 40 Misc. Rep. 449.

Hatch v. Consumers Co., 17 Idaho 204; 104 Pac. 670; affirmed 224 U. S. 148.

The conclusion on this head is that the trial court should have granted the injunction prayed and left the supply company to its action at law, to prove the reasonableness of its charge.

POINT IX.

If the Kansas Natural Gas Company's rates are not subject to regulation, it is bound by contract, express and implied; first, to continue service until, after notice, a substitute can be provided; and second, at rates agreed upon.

This vast investment of many millions of dollars in supply pipe lines and distribution properties and more millions in consumers' appliances, and this enormous business of many millions of dollars annually, is not a mere accident. It was planned, designed and constructed on a business basis, and the undertakings, rights and liabilities of the respective parties are fixed and measured by contracts.

While it may be admitted that the contracting parties were presumed to know that *rates* were subject to state regulation, and that therefore said rates, prescribed in said contract, are now superseded by the passage of the Public Service Commission Acts and the subsequent orders of the Commissions; the balance of the contracts and the essential relations they established still exist—the gas is still furnished.

That contract provides that the Supply Company shall furnish gas to the Kansas City Gas Company for the term of a certain ordinance, thirty years from September 27, 1906 (Rec. 49, 61), or any renewal or extension of such ordinance, or

practically in perpetuity (Rec. 41). That contract provides that said Supply Company shall furnish the distributing companies "natural gas in such amount as will at all times fully supply the demand for all purposes of consumption, as provided in this contract" (Rec. 41). "So long as the party of the first part is able to supply the same, the parties of the second part agree to buy from the party of the first part all the gas they may need to fully supply the demand for domestic consumption in said city" (Rec. 42).

The ordinance which fixes the tenure of that contract and is referred to therein and attached thereto as Exhibit 1, provides (Rec. 55, Sec. 14):

"Should the supply of natural gas, obtainable by grantees reasonably accessible, be, at any time hereafter during the life of this ordinance, inadequate to warrant them in continuing to supply natural gas under the terms of this ordinance, or should the Common Council of Kansas City so find at any time (and in the event of a disagreement as to the facts in this respect either party or a gas consumer may have recourse to the courts to establish the facts), they shall not be longer required to do so, but shall manufacture and furnish manufactured gas to said city and its inhabitants through said mains and pipes under the provisions of this ordinance as far as applicable. * * * The grantees shall not discontinue furnishing natural gas without serving at least six months' written notice upon the mayor of Kansas City of their intention so to do."

Even the final opinion of the court in the case of *Landon v. Commission et al.*, 269 Fed. 423, does not vacate and set aside said contracts in their entirety, but merely holds that (p. 432):

"The conclusion, therefore, is that the obligations of the Kansas Natural Gas Company under said supply contracts have been discharged and terminated by reason of the failure of gas, as provided for in said supply contracts. This conclusion applies to all of the contracts in controversy excepting No. 28.

The consideration running to the Kansas Natural Gas Company in the supply contracts was dependent upon the rates to be charged to the ultimate consumers. Those rates were therefore a primary inducing cause to the making of the supply contracts, and a nullification of the rates fixed for the ultimate consumer would necessarily affect the obligation of the supply contracts. In some instances these rates for the ultimate consumer were fixed by franchise ordinances, which were claimed to be contracts between the distributing companies and the cities which they served. So far as such contract rates were attempted to be made by cities of the first class in Kansas, they were *ultra vires* and void. *State ex rel. v. Wyandotte County Gas Co.*, 88 Kan. 165, 127 Pac. 639, *Id.*, 231 U. S. 622, 34 Sup. Ct. 226, 58 L. Ed. 404. These decisions affected unfavorably the supply contracts between the Kansas Natural Gas Company and distributing companies operating in cities of the first class in Kansas, and included Nos. 1, 6, 16, 19, 20, 27 and 32 in the above list.

Though cities of the second and third classes retained power to make contract ordinance rates, nevertheless, by Chapter 238, Laws of 1911, Kansas, all such powers in those cities were superseded by or made subordinate to the power lodged by said statute in the Public Utilities Commission of Kansas, and since transferred to the Court of Industrial Relations."

The decree upon this opinion merely recites that these contracts "are not binding upon the Receivers of the Kansas Natural Gas Company or upon the Kansas Natural Gas Company, and the defendants * * * are all permanently enjoined from enforcing the aforesaid supply-contracts or *rates fixed or referred to therein* against plaintiffs, Kansas Natural Gas Company or said distributing companies" (Rec. 80).

In conformity with the foregoing opinion and decree, which clearly dealt only with rates, the Supply Company has continued to furnish, supply and sell gas to the distributing companies, and the latter have continued to purchase, receive, distribute and sell the same to their customers to this very hour, and will continue so to do for years to come.

The reasonable construction of the foregoing decision, therefore, is that the parties making said contracts were presumed to know that the rates fixed or agreed to therein were subject to regulation by state authority; that when the states exercised such power, the rates prescribed by the states superseded those named in the ordinances and supply-contracts. The two parts of the contract were "distributive" and could stand apart. *Freeport Water Co. v. Freeport City*, 180 U. S. 587.

There is nothing in the facts or record, the contracts or the opinions and decrees to justify the conclusion that the remaining and vital provisions of the supply-contracts, to furnish and supply natural gas, do not yet obtain; or that natural gas may be shut off and discontinued without reasonable notice, at least the notice stipulated in the contract.

In *Salisbury & S. Ry. Co. v. Southern Power Co.*, 102 S. E. 625, 626; P. U. R. 1920 D, 560, 564, when a power company tried to discontinue service under similar circumstances, the court said:

"The citizens of Salisbury, Spencer and adjacent territory have a very vital interest in this controversy.

The defendant does not undertake to furnish them electricity except through the medium of a distributing company. If defendant *cannot* be compelled to so continue to furnish it then these citizens have no other resource except to pay the higher cost of coal-made current, and the defendant is practically free from state control. Therefore they have a direct public interest in imposing upon defendant the duty it voluntarily assumed ten years ago and has been discharging ever since."

On the question of price under this head we submit that when the Supply Company on July 14, 1919, promulgated, published and mailed to the Kansas City Gas Company and other distributing companies its "Schedule of Rates for the Sale of Gas" (Rec. 70) and named therein the price of 35 cents per thousand feet; and the Kansas City Gas Company and other distributing companies, relying upon said offer to furnish and sell said gas at such price, applied to the Public Service Commission (Rec. 82) and procured an order from said Commission (Rec. 87) approving said 35-cent city gates price for said Supply Company (Rec. 88) and a schedule of selling rates bottomed upon such city gates price for itself (Rec. 87); and said Kansas City Gas Company did thereupon pay said 35 cents per thousand feet, and has continuously thereafter so paid the same (Rec. 101), and is willing, ready and able to continue so to do, *a contract arises*, not only implied but expressed, to continue to furnish said gas at said price until changed by agreement or, failing in such agreement, until such reasonable time after notice to enable said Kansas City Gas Company to make other provision for a supply of gas to meet the demands of its customers.

It follows from the foregoing that both an express and an implied contract exists obligating said Supply Company to furnish gas to the Kansas City Gas Company and other distributing companies until relieved from such obligation by agreement or upon proper notice as provided in said ordinance attached to said contract (Rec. 56), or such other reasonable notice as the equities of the case would require.

Upon this ground alone the trial court below should have enjoined the Supply Company from shutting off the supply of gas to Kansas City and its people, with its resultant, inestimable damage and loss to the public, leaving the question of price to be determined in an action at law.

The Kansas Case No. 133.

This court will take judicial notice of the Kansas Case, reported 111 Kans. 808, 208 Pac. 622, in which it appears that the Wyandotte County Gas Company is an intervener and party to that suit; that said company is entitled to the benefits of the judgment, decree and writ of mandamus issued in that case, and its rights under said decree cannot be defeated without a review of the judgment of said court in its favor. Yet the plaintiff in error, the Supply Company herein, has not sued out a writ of error as to said Wyandotte County Gas Company, and has not brought up the record to this court contained in the intervening petition and exhibits thereto and the Supply Company's answer. This court cannot say from the partial record in that case brought here whether or not the judgment of the Supreme Court of Kansas is correct.

Wherefore, said appeal should be dismissed.

Conclusion.

It follows from the foregoing that public policy requires the regulation of the Kansas Natural Gas Company; that the state has so provided for such regulation; that interstate commerce in natural gas is local in its nature, peculiarly of local concern, makes provision for local needs and pertains to a local public service; that non-action by Congress relating to such local commerce implies the needed regulation by the states; that the Supply Company shipping interstate gas locally sold, delivered and furnished to a public utility, consents to rate regulation by the states; that the Landon Case (249 U. S. 236) turned on the fact that the Receiver's rates were contractual—consent rates; that the challenged rates were for distributing companies, and that he had no cause of action; that the Supply Company may not arbitrarily discontinue the supply of gas to the Kansas City Gas Company without notice and without giving it an opportunity to make provision for supplying said city with other fuel; and that said Supply Company is now under contract to continue furnishing natural gas to said Kansas City Gas Company at reasonable rates fixed by the State Commission.

Wherefore, this case should be remanded with direction to issue a decree enjoining the Kansas Natural Gas Company from shutting off and discontinuing the supply of natural gas to the Kansas City Gas Company serving Kansas City, Missouri, and its inhabitants, and to other distributing companies furnishing gas in numerous cities, towns and villages in the State of Missouri.

Respectfully submitted,

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